Supreme Court, U.S.
FILED
JUL 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2044

In The
# Supreme Court of the United States
October Term, 1983

BEN CARTER,

*Petitioner,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD W. FISHER
720 National Bank Building
Toledo, Ohio 43604
(419) 255-7368

JAMES T. LANGFORD
1000 Rhodes-Haverty Building
Atlanta, Georgia 30303
(404) 522-4280

*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

SPP

BEST AVAILABLE COPY

## QUESTION PRESENTED

Did the court of appeals err in concluding that a *Farmer*-type claim for intentional infliction of emotional distress by outrageous conduct was not proved at trial?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Statement of the Case | 1 |
| Argument | 3 |
| Conclusion | 4 |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| *Farmer v. Carpenters,* 430 U.S. 290 (1977) | 2, 4 |
| *Garmon v. San Diego Building Trades Council,* 359 U.S. 236 (1959) | 2, 4 |
| *Jones v. Operating Engineers, Local 926,* — U.S. —, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983) | 3 |
| *Perko v. Iron Workers, Local 207,* 373 U.S. 701 (1963) | 3 |
| *Plumbers, Local 100 v. Borden,* 373 U.S. 690 (1963) | 3 |
| *Sheet Metal Workers v. Carter,* 724 F.2d 1472 (11th Cir. 1984) | 1, 3 |
| *Viestenz v. Fleming Companies,* 681 F.2d 699 (10th Cir. 1982) cert. denied — U.S. —, 103 S. Ct. 303, 74 L.Ed.2d 284 (1982) | 4 |


STATUTES:


| | |
|---|---|
| National Labor Relations Act, 29 U.S.C. Sections 158(b) (1) (A) and (b) (2) | 3 |

No. 83-2044

In The

# Supreme Court of the United States

October Term, 1983

BEN CARTER,

*Petitioner,*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

The instant case "proceeded to trial only upon an appended claim for intentional infliction of emotional distress." *Sheet Metal Workers v. Carter,* 724 F.2d 1472, 1475 (11th Cir. 1984) (Appendix to Petition, 8a). Petitioner tried to frame the tort claim against Respondent Sheet Metal Workers' International Association, AFL-

CIO (International) so that it would fit within the exception recognized in *Farmer v. Carpenters,* 430 U.S. 290 (1977) and thus not be preempted under the rule in *Garmon v. San Diego Building Trades Council,* 359 U.S. 236 (1959). But, as the court of appeals held, he failed to adduce facts at trial sufficient to bring the claim within the reach of the *Farmer* exeption.

Petitioner is a sheet metal worker who voluntarily withdrew from membership in the International's New Jersey affiliate, Local Union No. 13 (Local 13) in 1971. Later in the same year he attempted to reinstate his union membership, but Local 13 refused to readmit him unless he paid certain trust fund delinquencies allegedly incurred at an earlier time when he had been an employer under agreement with the local union. Petitioner denied, and refused to pay, the claimed indebtedness.

Unable to resolve the dispute at the local-union level, he wrote to the International for assistance. It should be noted that he was not a union member at this time. The International declined to intercede on his behalf. It is this inaction that is the gravaman of the tort claim against the International.

Petitioner left New Jersey and moved to Augusta, Georgia, in late 1971 with his dispute with Local 13 still unresolved. In early 1972, he tried, without success, to join the International's Georgia affiliate, Local Union No. 85 (Local 85). Officials of Local 85 told him he would have to be reinstated in his "home" local union and obtain from it a transfer card which, in turn, would be honored in Georgia.

Petitioner contacted several union employers in the Augusta area seeking work, but was unable to get clearance from Local 85. As a consequence, he either was not hired by the union employers, or, if hired, had to quit. Local 85's actions were almost certainly unfair labor practices under §§ 8(b) (1) (A) and 8(b) (2) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(b) (1) (A) and (b) (2), over which the Labor Board has exclusive remedial jurisdiction. *Jones v. Operating Engineers, Local 926,* — U.S. —, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983); *Plumbers, Local 100 v. Borden,* 373 U.S. 690 (1963); *Perko v. Iron Workers, Local 207,* 373 U.S. 701 (1963).

He thereafter obtained jobs away from the Augusta area with non-union employers whose wages were below the union scale. The disparity in earnings while working for these non-union employers allegedly caused him to suffer the emotional distress for which he sought to recover damages against the International. His testimony in toto on this issue is as follows:

> "Well, most of the time I couldn't get suitable work. And when I did gain work, it was for a lower wage rate and I couldn't provide for my wife as I had usually done. And I felt dejected."

*Sheet Metal Workers v. Carter,* 724 F.2d 1472, 1475 (11th Cir. 1984) (Appendix to Petition, 8a).

———o———

## ARGUMENT

Local 85, which was named as a party defendant originally but voluntarily dismissed prior to trial, undoubtedly caused Petitioner to suffer emotional distress as a

result of its employment interference. In committing the unfair labor practices, however, Local 85 did not treat Petitioner in a particularly abusive or hostile manner; it did nothing more than refuse to grant him clearance to work for union-signatory employers. Even if Local 85 had been retained as a defendant, therefore, its conduct would not have given rise to a non-preempted damage claim under the *Farmer* exception which is applicable only when an unfair labor practice is committed in a particularly abusive manner. *Viestenz v. Fleming Companies,* 681 F.2d 699 (10th Cir. 1982) cert. denied — U.S. —, 103 S.Ct. 303, 74 L.Ed.2d 284 (1982).

The International declined to become involved in the acrimonious but parochial dispute between Petitioner and his "home" local union in New Jersey. It did nothing else. It did not participate in, and, in fact, was unaware of, Local 85's unfair labor practices in Georgia which proximately caused Petitioner's emotional distress. Its inaction manifestly was not outrageous conduct for which Petitioner can maintain a state-law tort claim under the *Farmer* exception to the *Garmon* rule.

———o———

## CONCLUSION

The petition should be denied.

Respectfully submitted,

DONALD W. FISHER
720 National Bank Building
Toledo, Ohio 43604
(419) 255-7368

JAMES T. LANGFORD
1000 Rhodes-Haverty Building
Atlanta, Georgia 30303
(404) 522-4280

*Attorneys for Respondent*